

**Criminal Appeal (SJ) No. 114 of 1989**

Against the judgment and order dated 25.01.1989 passed by Shri Kamala Prasad, Ist Additional Sessions Judge, Sitamarhi in Sessions Trial No. 197 of 1985.

1. Badri Mian, Son of Subhan Mian.

2. Nathuni Sah, Son of Akalu Sah.

Both resident of village – Ratanpur, Police Station – Majorganj,  
District – Sitamarhi.

3. Dukha Rai, Son of Bilas Rai, resident of village – Mahawada, Police  
Station – Balpalti, District – Sitamarhi.

4. Moti Mian @ Aatur Rahman, Son of Nathuni, resident of village –  
Bhasepur, Police Station – Dumara, District – Sitamarhi.

.... .... Appellants.

Versus

The State of Bihar

.... .... Respondent.

For the Appellant/s : Mr. Rakesh Kumar Sinha, Advocate.  
Mr. Anuj Prakaash, Advocate.

For the Respondent : Mr. Ajay Mishra, A.P.P.

**P R E S E N T**

***THE HON'BLE MR. JUSTICE GOPAL PRASAD***

**Gopal Prasad, J.** Heard learned counsel for the appellants and learned  
counsel for the State.

2. The appellants have been convicted under Section 396 of the  
Indian Penal Code and sentenced to undergo rigorous imprisonment for  
ten years. The appellants have further been convicted under Section 412  
of the Indian Penal Code and sentenced to undergo rigorous  
imprisonment for ten years. However, it has been ordered that both the

sentences shall run concurrently.

3. The prosecution case as alleged by the informant, Ram Sresth Rai is that in between the night of 14/15.09.1993 while the informant was sleeping in the western room of his house after closing the door his cousin Mahendra Rai was sleeping in the western Osara of the courtyard then he got up on sound on knocking saw a dacoit has entered into my room then he came out of room and then he assaulted one dacoit but some dacoit came out from the house of his uncle and then on Hulla dacoits came out from Angan of the outside and then the villagers collected and chased the dacoits and there was scuffle between the dacoits and villagers at a distance of about 100 yards of the house of the informant and even the villagers tried to snatch the double barrel gun from dacoits and a dacoit having a single barrel gun fired which hit Ramjas Rai and succumbed to injury while taking to hospital and the accused persons fled away to the west. However, after two hours it was found that one Ram Sundar Rai, Chaukidar found lying dead in Bathan of the informant and the list of the looted articles were seized and even the description of the dacoits have been mentioned in the fardbeyan of the informant Ram Sresth Rai.

4. On the fardbeyan of the informant, the F.I.R. was lodged and after investigation the charge-sheet was submitted and on submission of the charge-sheet the cognizance was taken and the case was committed

to the Court of Sessions and subsequently after commitment the charge was framed under Section 396 and 412 of the Indian Penal Code and trial proceeded.

5. During the trial 13 witnesses were examined on behalf of the prosecution as P.W. 1 Mahendra Rai, P.W. 2 Ram Nandan Rai, P.W. 3 Ram Jinis Rai, P.W. 4 Laxmi Rai, P.W. 5 Ram Sagar Rai, P.W. 6 Ram Sresth Rai, P.W. 7 Dr. T. N. Singh who has conducted post-mortem examination on person of Ramjas Rai, P.W. 8 Shyam Bihari Rai, P.W. 9 Ram Sundar Rai, P.W. 10 Dr. K. K. Singh who examined the injured Deodhar Devi, Jinis Rai, Ram Srestha Rai and Ram Sunder Rai, P.W. 11 Kumar Subodh Sinha, the then O/C G.R.P.S., Sitamarhi, P.W. 12 Ramesh Chandra Mishra the then Judicial Magistrate, Sitamarhi who has conducted the Test Identification Parade, P.W. 13 is Satyadeo Prasad though wrongly numbered as P.W. 12 who has proved Ext. 6/1 and has proved Test Identification Chart by the then Block Development Officer, Bajpatti and Ext. 7 page 1 to 125 of the case diary.

6. The documentary evidence adduced as Ext. 1 is the fardbeyan, Ext. 2 is the post-mortem report, Ext. 3 to 3/2 are the seizure lists regarding the blood stained earth to small Danda of bamboo and broken piece of Kara of Gillet about two inch long and wooden plate of a gun fitted with iron part, Ext. 4 series are the injury report of the injured,

Ext. 5 is the self statement of Kumar Subodh Sinha, O/C G.R.P.S., Sitamarhi, Ext. 1/1 and Ext. 5 is forwarding report of the accused Badri Mian, Nathuni Sah, Moti Mian @ Ataur Rehman to the C.J.M. by Subodh Sinha, In-Charge, Rail P.P., Sitamarhi, Ext. 6 is the T.I. Chart of the articles seized. After considering the oral and documentary evidence the order of conviction and sentence recorded as stated above.

7. Learned counsel for the appellants, however, contended that the I.O. in this case has not been examined and the identification of the accused does not inspire confidence. The conviction on the basis of single identification is not proper. The seizure list of seized article has not been proved to establish conviction under Section 412 of the Indian Penal Code and hence the conviction is not sustainable.

8. The prosecution case as alleged in the fardbeyan is that the occurrence took place in between the night of 14/15.09.1993 while the informant was sleeping in the western room of his house when 20-25 dacoits came and entered into the house looted and ransacked the house and when the informant made Halla the villagers collected there was in scuffle between the dacoits and the villagers and in this loot the dacoits resorted to firing causing injury to the witnesses as well as one Ramjas Rai got injured from the firearm fired by the dacoits by which he succumbed to injury and the dacoits fear.

9. However, P.Ws. 1, 2, 3, 4, 5, 6, 8 and 9 have supported the

prosecution case about the dacoity in the house of the informant and others at mid-night on the date of occurrence dated 15.09.1983 it has come in evidence that during the dacoity, there was scuffle between the dacoits and villagers, in which the dacoits resorted to firing causing injury to Ramjas Rai and others and due to the injury Ramjas Rai succumbed to injury.

10. P.W. 7 is the doctor who conducted the post-mortem on the person of Ramjas Rai and found the firearm injury and time elapsed since death stated to be 12 to 24 hours since the date of examination on 15.09.1983 at about 3:45 P.M. and hence the time of the death correspond to the period of the dacoity.

11. P.W. 10 Dr. K. K. Singh who has found the injury on the person of Deodhar Devi, Jinis Rai, Ram Srestha Rai and Ram Sunder Rai and injury correspond to the period of the dacoity and hence the witnesses have supported the prosecution case about the dacoity and during the dacoity Ram Sresth Rai got injured by the firearm used by the dacoits by which he succumbed to injury.

12. However, the I.O. of the case has not been examined.

13. However, P.W. 11 Kumar Subodh Sinha who was the then O/C G.R.P.S., Sitamarhi and has stated that on 15.09.1983 at about 4:45 A.M. in the morning he was examining the train come from Darbhanga and he saw three persons getting into one bogie from another and then

he doubted and caught hold of the three and from there search found them in possession of firearm as well as Sendh Mari. The said articles were seized from the possession of Badri Mian, Nathuni Sah and Moti Mian and seizure list was prepared and they disclosed that in the last night they have committed dacoity and the jewelries recovered from the possession was their share of the loot of dacoity. He has further stated that later he learnt that during the dacoity they have killed one villager and the Chaukidar with regard to recovery of firearm and jewelry he lodged a case against them and has proved the copy of the fardbeyan which is Ext. 1/1 in his writing and has also proved the forwarding letter sent to the Chief Judicial Magistrate which is in carbon copy of original in his writing marked as Ext. 5. In his evidence, he has stated in para 4 that the seizure list is in his writing. However, subsequently he says that this is a copy of the seizure list. However, the said seizure list is not marked as exhibit in evidence and it appears that the seizure list was not brought in evidence and the copy of the seizure list was not marked. However, he has stated that he lodged a case under Section 414 of the Indian Penal Code and Arms Act but the charge-sheet is only submitted in the Arms Act. However, in cross-examination he has stated that the seized articles are not in the Court. However, the I.O. of this case has not been examined and though the P.W. 11 has stated in his evidence that some jewelries and firearm was

seized from the possession of Badri Mian, Nathuni Sah and Moti Mian but the seizure list has not been proved to establish which article seized from which accused.

14. However, P.W. 12 is the Judicial Magistrate who conducted the T.I.P of the suspect and he has stated that he conducted the T.I.P. of accused Badri Mian, Nathuni Sah, Moti Mian @ Ataur Rehman and Dukha Rai by completing with the norms of identification of T.I.P. mixing one accused with nine persons and has stated that in the T.I.P. of the four accused the witnesses Ram Srestha Rai identified Badri Mian, Nathuni Sah, Moti Mian @ Ataur Rehman and Dukha Rai (Ram Sresth Rai P.W. 6) and witness Ram Sresth Rai, P.W. 8 identified Nathuni Sah and Moti Mian @ Ataur Rehman and the witness Laxmi Rai P.W. 4 identified Nathuni Sah. However, one Amir Rai (not examined) identified Moti Mian. P.W. 12 has also proved the T.I. Chart in his writing marked as Ext. 6. However, the T.I. Chart also shows that the T.I.P. of the suspect were conducted and out of them Ram Sresth Rai identified by three and Laxmi Rai identified Nathuni Sah, Amir Rai identified Moti Mian @ Ataur Rahman and witness Mahendra Rai did not identify.

15. However, P.W. 13 Satyadeo Prasad who has been renumbered as P.W. 12 has formally proved Ext. 6/1 the T.I. Chart regarding the identification of the articles. However, the Block Development Officer

conducted the T.I.P. of the articles has not been examined in the case. However, from the evidence of this witnesses it is established that the occurrence of dacoity committed in the house of Ram Sresth Rai and during the dacoity Ramjas Rai was killed by the dacoit and hence it is established that the dacoity committed and during the dacoity the witnesses got injured and one of the person died. However, so far the identification of the witnesses during the dacoity concerned P.W. 1 in this evidence has stated that he identified four dacoits and has claimed to have identified the four dacoits in court. However, he has stated that he did not participate in the T.I.P. but from the T.I. Chart and the evidence of P.W. 12 Ramesh Chandra Mishra, it is apparent that this witness did not identify the appellants in T.I.P before the Magistrate who conducted the T.I.P. of the suspect. Hence the identification of this witness of the accused has got no signification. P.W. 2 has also claimed to have identified the dacoits in court but he has stated that he did not participate in any T.I.P. for identification. He has further stated that he does not know the name of accused to whom he identifies in court and hence the identification of the P.W. 2 does not inspire confidence. P.W. 3 he did not identify any of the dacoit. P.W. 4, however, claims to have identified Nathuni Sah. He has also identified Nathuni Sah in T.I.P. P.W. 12 has also supported that his witness identified Nathuni Sah during T.I.P. conducted in the jail. This witness has also stated that he



went to identify the looted articles in G.R.P. Office and there he identifies the material exhibit Kara, Hasuli and Anant. P.W. 5 has also not identified the dacoits. P.W. 6 supported the factum of the dacoity and has stated that he identify dacoits in the light of the torch. He has further identify Dukha Rai, Nathuni Sah and Moti Mian in Court and has also claimed to have identified the three in the T.I.P. and hence he identified the three dacoits in Court. P.W. 6 has further stated that during the dacoity in his house the dacoits have looted away article. Material Ext. II and II/1, material Ext. III and III/1 to III/3 which are two Hashuli and four Karas and material Ext. 4 were looted from his house during the dacoity and has claimed to have identified in the said T.I.P. There is nothing in his cross-examination of these witnesses to disbelieve the identification. However, P.W. 8 in his evidence has stated that he did not identify any dacoit.

16. Hence, so far the evidence on identification is concerned except P.W. 6 but though claimed to have identified but he did not identify the accused in T.I.P. and P.W. 8 in his evidence has stated that he did not identify the accused.

17. The Judicial Magistrate who conducted the T.I.P. has stated that five persons had participated in T.I.P. of the accused. Ram Sresth Rai (P.W. 6), Shyam Bihari Rai (P.W. 8), Laxmi Rai (P.W. 4) and Amir Rai (not examined). However in court Shyam Bihari Rai (P.W. 8) deny

to identify any of the witnesses and hence the identification of the accused persons remained only with P.W. 4 and P.W. 6. P.W. 4 has identified accused Nathuni Sah and P.W. 6 has identified Nathuni Sah, Moti Mian and Dukha Rai. The identification by P.W. 1 has been disbelieved Amir Rai has not been examined to support the prosecution case.

18. Hence the case hinges regarding identification merely of two witnesses. Ram Sresth Rai (P.W. 6) who identify three and Laxmi Rai (P.W. 4) who identify only one and hence taking into consideration these evidence it is apparent that Badri Mian was not identify by any of the witnesses in Court. The evidence regarding the identification against Moti Mian and Dukha Rai is only one identification by Ram Srestha Rai. The accused Nathuni Sah identified by two witnesses Laxmi Rai and Ram Sresth Rai.

19. So far the charge under Section 412 of the Indian Penal Code is concerned the prosecution to establish the charge under Section 412 of the Indian Penal Code has to establish three facts (i) ownership of the article looted in question (ii) the article was looted in the dacoity (iii) the recent possession of the articles with the accused. However, though P.W. 11 has come to say that while he was at station he found three persons in suspicious condition and he apprehended and seized some jewelry and firearm from possession of accused and he lodged a case

under Section 414 of the Indian Penal Code and under the Arms Act. However, the seizure list of the said seized articles alleged to have been recovered from the possession of the accused person has not been established as the seizure list of the articles seized from the three accused persons has not been proved in the case and hence the possession of the articles looted with the accused has not well been established. However, the material Exts. II, III and IV series though have been proved to be the articles which were looted during the trial belongs to the prosecution party the informant and hence it has established that the owner-ship of the articles with the informant and is also established that the looted articles were theft away during the dacoity. However, the seizure list having not been proved hence, the recent possession of the articles with the appellants has not been established. The I.O. P.W. 11 though has stated in his evidence in cross-examination in para 9 that the articles seized which he had seized from the possession of the accused persons are not in the court before him and hence he has neither proved seizure list nor stated that which were the articles seized from which accused nor the seizure list has not been brought in evidence or proved in evidence to show that what articles were seized from the possession of these accused persons and hence possession of the articles seized with accused after dacoity has not been proved to establish and is missing in evidence and

hence the order of conviction recorded under Section 412 of the Indian Penal Code cannot sustain and when the possession of the articles seized has not been established with accused after dacoity.

20. Hence, having regard to the facts and evidence neither Badri Mian nor the article which was looted during the dacoity has been established to be in his possession and hence the conviction and sentence against Badri Mian is not sustainable. However, so far none of the witnesses have identified three appellants Nathuni Sah, Moti Mian @ Ataur Rehman and Dukha Rai are concerned, only one identification remains intact against Moti Mian @ Ataur Rehman. However, with regard to Nathuni Sah there are two identifications informed by P.W. 4 and other by P.W. 6. However, having regard to the fact that there is only one identification against Moti Mian @ Ataur Rehman and Dukha Rai a benefit of doubt be given with regard to their single identification, hence, having regard to the facts and circumstances since the accused Moti Mian @ Ataur Rehman and Dukha Rai are concerned there is only one single identification remains intact and hence the benefit of doubt can be given as a conviction in single identification that there is dacoity case and hence I do not find and hold that the benefit of doubt be given to Moti Mian @ Ataur Rehman and Dukha Rai in view of the single identification against them only single identification established against them and hence the order of conviction recorded by the learned lower

court against Badri Mian, Moti Mian @ Ataur Rehman and Dukha Rai is hereby set aside. However, with regard to Nathuni Sah there are two identifications and both have been corroborated by the T.I.P. and hence I do not want to disturb the finding of the learned lower court and hence I find and hold that Nathuni Sah for offence under Section 396 of the Indian Penal Code and hence his conviction and sentence recorded under Section 396 of the Indian Penal Code is maintained. However, the order of conviction recorded against the three appellants Badri Mian, Moti Mian @ Ataur Rehman and Dukha Rai is hereby set aside and the appeal is allowed in part.

**(Gopal Prasad, J.)**

Patna High Court, Patna.  
Dated, the 20<sup>th</sup> July, 2011.  
N.A.F.R./Kundan.